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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

**MARKHAM ROBINSON, in his capacity as the
Presidential Elector and Chairperson-Elect of the
American Independent Party,**

Plaintiff,

v.

SECRETARY OF STATE DEBRA BOWEN, in her individual and official capacities, THE REPUBLICAN NATIONAL COMMITTEE, and organization, form unknown, THE REPUBLICAN PARTY OF CALIFORNIA, an organization, form unknown, SENATOR JOHN McCAIN, in his individual and official capacities, DOES ONE through FIFTY FIVE, inclusive,

Defendants.

3:08-CV-03836 WHA

**SECRETARY OF STATE
DEBRA BOWEN'S
OPPOSITION TO
PLAINTIFF'S COMPLAINT
FOR DECLARATORY AND
INJUNCTIVE RELIEF**

Date: September 11, 2008
Time: 7:30 a.m.
Dept: 9
Judge: The Honorable William
Alsup

Trial Date:

Action Filed: August 11, 2008

I. INTRODUCTION

Plaintiff Markham Robinson has filed a complaint seeking, among other things, an injunction barring the California Secretary of State from including Senator John McCain on the 2008 Presidential Election Ballot as the Republican nominee for President of the United States. Plaintiff argues that such relief is appropriate because, he alleges, Senator McCain does not meet the qualifications for President as established in the United States Constitution. The Secretary of State does not take a position on the merits of Plaintiff's claims, but submits that the injunction sought against her should be denied for two reasons.

9 First, Plaintiff's request for injunctive relief against the Secretary of State fails to state
10 a claim upon which relief may be granted. Because Plaintiff does not, and cannot, allege that the
11 Secretary of State has committed any violation of law or infringed on any right held by Plaintiff
12 by including Senator McCain as the Republican nominee for President on the ballot, his claim
13 against the Secretary should be dismissed. Second, Plaintiff's failure to timely file his complaint
14 will prevent the Court from ruling on the injunction prior to the printing and distribution,
15 pursuant to statutory mandates, of ballots containing Senator McCain's name as the Republican
16 Presidential nominee. Indeed, thousands of California voters residing overseas will have
17 received and be able to cast their votes for President before this Court is able to rule on Plaintiff's
18 complaint. Accordingly, Plaintiff's request for injunctive relief should be denied because it
19 would result in an unprecedented disruption of an ongoing election.

II. STATEMENT OF RELEVANT FACTS AND LAW

21 The California Secretary of State [hereafter “Secretary”] is the State’s chief elections
22 officer. Cal. Gov’t Code, § 12172.5. She is responsible for ensuring that State elections are
23 conducted efficiently and that the election laws are enforced. *Id.* Consistent with these
24 obligations, the Secretary is required to provide local elections officials with a certified list of the
25 names, party affiliations, and ballot designations of candidates nominated by their respective
26 parties to appear on the November 4, 2008 Presidential General Election ballot. Cal. Elec. Code,
27 §§ 6901, 8148.

28 Specifically, the Secretary was required to distribute a certified list of candidates to

1 local elections officials by August 28, 2008. *Id.* § 8148 [certificate shall be delivered not less
 2 than 68 days before the election]. For purposes of the Republican candidates for President and
 3 Vice President, the Secretary is required to include in her certified list the names of the nominees
 4 provided by the Chairperson of the California Republican State Central Committee (or California
 5 Republican Party). *Id.* §§ 6901, 7310(b).

6 Where, as this year, the Republican National Convention is scheduled to conclude after
 7 the deadline for the Secretary to deliver the certified candidate list to local elections officials, the
 8 California Republican Party must notify the Secretary of its nominees once the candidate for
 9 President has secured a sufficient number of delegate votes to assure his or her nomination and
 10 selected a Vice Presidential nominee. *Id.* § 7310(a). Once she was informed of the Republican
 11 Party's nominees, on August 29, 2008, the Secretary distributed a certified list of candidates that
 12 included Senator McCain and Governor Sarah Palin as the Republican nominees for President
 13 and Vice President, respectively.¹⁴ Declaration of Cathy Mitchell [hereafter "Mitchell Decl." ¶ 5.

14 Upon receiving the certified list of candidates, local elections officials are responsible
 15 for printing and distributing sample ballots and ballots to registered California voters. Cal. Elec.
 16 Code, §§ 13000, 13303. And in federal elections, local officials are required to send a ballot to
 17 voters residing abroad "as soon as possible" after September 5, 2008 (60 days prior to the general
 18 election). *Id.* § 3307. Once they receive their ballots, overseas voters are entitled to cast their
 19 vote for the candidates of their choice and return their ballots to local elections officials. *Id.* §§
 20 3304, 3311.

21 By September 25, 2008, local elections officials may begin mailing sample ballots to
 22 registered voters throughout California. *Id.* § 13303(a). The sample ballots are identical to the
 23 official ballots that will be used in the November 4, 2008 Presidential General Election, and
 24 therefore will include the offices and names of candidates for each office. *Id.* Local elections

25
 26 1. Although Senator McCain was clearly the presumptive Republican nominee for President
 27 as of August 28, 2008, he did not select a Vice Presidential running mate until one day later, on
 28 August 29, 2008. In compliance with statute, the Secretary distributed a certified list of candidates
 identifying Senator McCain as the Republican nominee for President on August 28, 2008, and
 updated the list the following day to include Governor Palin as his running mate.

1 officials must have completed mailing out the sample ballots no later than October 14, 2008. *Id.*

2 On August 11, 2008, Plaintiff filed a complaint (hereafter “Pl. Compl.”) seeking
 3 declaratory and injunctive relief against the defendants. As against the Secretary of State,
 4 Plaintiff seeks only injunctive relief precluding her from “following California law and placing
 5 Senator McCain’s name on the California Ballot.” Pl. Compl. ¶ 24. On August 21, 2008, the
 6 Court issued a scheduling order setting a hearing on Plaintiff’s complaint for September 11,
 7 2008.

8 **III. ARGUMENT**

9 **A. Plaintiff’s Cause Of Action Seeking Injunctive Relief Against The Secretary Of
 10 State Should Be Denied Because It Fails To State A Claim Against The Secretary
 And Is Contrary To The Public Interest.**

11 The Secretary does not take a position on the merits of Plaintiff’s claim challenging
 12 Senator McCain’s eligibility to be President. As the State’s chief elections officer, the Secretary
 13 is obligated to ensure that the Presidential election is conducted efficiently, fairly, and in
 14 compliance with State law. Cal. Elec. Code, § 12172.5. The Secretary, however, is not
 15 responsible for evaluating the personal qualifications of the respective political parties’
 16 presidential nominees. Therefore, it would be inconsistent with the Secretary’s statutory duties
 17 to opine on whether Senator McCain meets the federal constitution’s qualifications for President
 18 of the United States. However, because the Secretary is responsible for ensuring the 2008
 19 Presidential Election is properly administered, she objects to Plaintiff’s effort to enjoin her from
 20 complying with California law by providing Senator McCain’s name as the Republican nominee
 21 for President of the United States to local elections officials.

22 **1. Plaintiff’s Claim Against The California Secretary Of State Should Be
 23 Dismissed Because It Fails To Allege That She Has Violated Any Law.**

24 Plaintiff does not allege that the Secretary of State, by performing her official duties,
 25 has committed a violation of either federal or State law. Plaintiff does accurately state that the
 26 Secretary is required by “*State law* to place Senator McCain on the ballot as a presidential
 27 candidate.” Pl. Compl. ¶ 21 [citing Cal. Elec. Code, § 6901] [emphasis added]. However,
 28 neither State nor federal law impose any obligation on the Secretary to verify that the respective

1 parties' nominees are eligible to hold the office of President or Vice President prior to placing
 2 their names on the ballot.²⁴ Because Plaintiff does not, and cannot, allege that the Secretary is
 3 violating any law or infringing on any right held by Plaintiff by placing Senator McCain on the
 4 California ballot, Plaintiff's claim against the Secretary should be dismissed because it fails to
 5 state a claim upon which relief may be granted. Fed. R. Civ. P. 12(b)(6); *Balisteri v. Pacifica*
 6 *Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1990) [dismissal proper when based on lack of a
 7 cognizable legal theory].

8 **2. Plaintiff's Request For Injunctive Relief Against The Secretary Of State
 9 Should Be Denied Because Denial Is In The Public Interest.**

10 Even if Plaintiff could establish a valid claim against the Secretary of State, his belated
 11 request for injunctive relief should be denied because relief cannot be granted until after the
 12 election is underway. In evaluating a request for injunctive relief, the Court must evaluate
 13 whether it is in the public interest to do so. *Sammartano v. First Judicial Dist. Court*, 303 F.3d
 14 959, 974 (9th Cir. 2002). This inquiry causes the Court to address the impact of its decision on
 15 parties and nonparties, alike. *Id.* And where the proposed injunctive relief threatens to disrupt a
 16 scheduled election, a "court is entitled to and should consider the proximity of a forthcoming
 17 election and the mechanics and complexities of state election laws, and should act and rely upon
 18 general equitable principles." *Reynolds v. Sims*, 377 U.S. 533, 584 (1964). Thus, "[i]nterference
 19 with impending elections is extraordinary, and interference with an election after voting has
 20 begun is unprecedented." *Southwest Voter Registration Educ. Project v. Shelley*, 344 F.3d 914,
 21 919 (9th Cir. 2003) [internal citation omitted]. In the instant case, the public interest tilts
 22 strongly in favor of allowing the November 4, 2008 Presidential Election to take place as planned
 23 and permitting the duly selected nominee of the Republican Party, John McCain, to appear on the
 24 ballot.

25 As previously noted, by September 5, 2008, local elections officials will begin mailing
 26 ballots containing Senator McCain's name to overseas voters. Cal. Elec. Code, § 3307; Mitchell

27 2. Federal law appears to delegate to the United States Congress responsibility for
 28 evaluating the qualifications of the President and Vice President. 3 U.S.C. § 15.

1 Decl. ¶ 6. Thus, as of tomorrow, the presidential election will officially be underway in
 2 California as overseas voters begin to receive, fill out, and return their ballots for counting by
 3 local elections officials. Further, in order to comply with statutory deadlines and ensure
 4 California voters receive their sample ballots sufficiently in advance of the November election to
 5 make informed choices, local elections officials began preparing sample ballots upon receiving
 6 the certified list of candidates from the Secretary of State on August 29, 2008. Mitchell Decl. ¶
 7 8. Because this Court will not be able to rule on Plaintiff's request for a preliminary injunction
 8 until, at the earliest, the matter is heard on September 11, 2008, any ruling that requires alteration
 9 of ballots that have already been distributed to overseas voters will have the unprecedented effect
 10 of disrupting an ongoing election.

11 **IV. CONCLUSION**

12 For the foregoing reasons, the Secretary respectfully requests the Court deny Plaintiff's
 13 request for injunctive relief and dismiss this action to the extent it seeks relief against the
 14 Secretary of State.

15
 16 Dated: September 4, 2008

17 Respectfully submitted,

18 EDMUND G. BROWN JR.
 Attorney General of the State of California

19 CHRISTOPHER E. KRUEGER
 Senior Assistant Attorney General

20 JONATHAN K. RENNER
 Supervising Deputy Attorney General

21 /s/ Nathan R. Barankin

22 NATHAN R. BARANKIN
 Deputy Attorney General

23
 24 Attorneys for Office of Secretary of State

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9
10 SUPERIOR COURT OF CALIFORNIA
11 NORTHERN DISTRICT OF CALIFORNIA
12

13 **MARKHAM ROBINSON, in his capacity as the**
14 **Presidential Elector and Chairperson-Elect of the**
15 **American Independent Party,**

Plaintiff,

v.

17 **SECRETARY OF STATE DEBRA BOWEN, in**
her individual and official capacities, THE
18 **REPUBLICAN NATIONAL COMMITTEE, and**
organization, form unknown, THE
19 **REPUBLICAN PARTY OF CALIFORNIA, an**
organization, form unknown, SENATOR JOHN
20 **McCAIN, in his individual and official capacities,**
DOES ONE through FIFTY FIVE, inclusive,

Defendants.

3:08-CV-03836 WHA

**DECLARATION OF CATHY
MITCHELL IN SUPPORT OF
SECRETARY OF STATE DEBRA
BOWEN'S OPPOSITION TO
PLAINTIFF'S COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF**

Date: September 11, 2008

Time: 7:30 a.m.

Dept: 9

Judge: The Honorable
William Alsup

Trial Date:

Action Filed: August 11, 2008

DECLARATION OF CATHY MITCHELL

I, Cathy Mitchell, declare as follows:

1. I am the Chief of Elections, employed in the Office of the California Secretary of State. I have served in that capacity since May 2007.

6 2. The Secretary of State is required by statute to perform numerous duties regarding
7 the administration of California's elections, including the 2008 Presidential General Election.
8 These duties include preparing and distributing to local elections officials a Certified List of
9 Candidates, which identifies all of the candidates who are eligible to appear on the general
10 election ballot.

11 3. Existing law requires the Secretary of State to distribute its Certified List of
12 Candidates for the 2008 Presidential General Election to local elections officials no later than
13 August 28, 2008.

14 4. For purposes of the Republican candidates for President and Vice President, the
15 Secretary of State is required to include in its certified list the names of the nominees provided by
16 the Chairperson of the California Republican State Central Committee (or California Republican
17 Party). When, as this year, the Republican National Convention is scheduled to conclude after
18 the deadline for the Secretary of State to deliver its candidate list to local elections officials, the
19 California Republican Party must notify the Secretary of State of its nominees once the candidate
20 for President has secured a sufficient number of delegate votes to assure his or her nomination
21 and selected a Vice Presidential nominee.

22 5. Upon being informed that Senator John McCain was the California Republican
23 Party's presumptive nominee for President, the Secretary of State, pursuant to statute, distributed
24 a certified candidate list identifying Senator McCain as the Republican Party nominee for
25 President on August 28, 2008. On August 29, 2008, the Secretary of State was informed that
26 Senator McCain had identified Governor Sarah Palin as the presumptive Republican Party
27 nominee for Vice President. Later that day, the Secretary of State redistributed its certified list of
28 candidates to include Governor Palin as the Republican nominee for Vice President. A true and

1 and accurate copy of the Certified List of Candidates distributed by the Secretary of State for the
2 November 4, 2008 General Election is attached hereto as Exhibit A.

3 6. Upon receiving the Certified List of Candidates, local elections officials are
4 required by statute to print and distribute sample ballots and ballots to registered California
5 voters. Among other duties, local elections officials are required to send a ballot to voters
6 residing abroad as soon as possible after September 5, 2008 (60 days prior to the general
7 election). Once they receive their ballots, overseas voters are entitled to cast their vote for the
8 candidates of their choice and return their ballots to local elections officials.

9 7. Local elections officials are also required to begin mailing sample ballots to
10 registered voters throughout California on September 25, 2008. The sample ballots are identical
11 to the official ballots that will be used in the November 4, 2008 Presidential General Election,
12 and therefore will include the offices and names of candidates for each office. Local elections
13 officials must have completed mailing out the sample ballots no later than October 14, 2008.

14 8. I am informed and believe that local elections officials throughout California
15 began preparing ballots and sample ballots containing Senator McCain's name as the Republican
16 nominee for President on August 29, 2008, in order to ensure that these ballot materials are
17 distributed within the legally prescribed deadlines.

18 9. I have personal knowledge of the foregoing facts and would so competently
19 testify if called as a witness to these proceedings.

20 I declare under penalty of perjury that the foregoing is true and correct and that this
21 declaration was executed on September 4, 2008, in Sacramento, California.

Cathy Mitchell
CATHY MITCHELL
Chief of Elections

EXHIBIT A



**DEBRA BOWEN | SECRETARY OF STATE
STATE OF CALIFORNIA | ELECTIONS**
1500 11th Street, 5th Floor | Sacramento, CA 95814 | Tel (916) 657-2166 | Fax (916) 653-3214 | www.sos.ca.gov

August 29, 2008

TO: All County Clerks/Registrar of Voters (08263)

FROM:

Evelyn Mendez
Evelyn Mendez
Program Manager, Candidates and Elections

SUBJECT: November General: Republican Vice President

The Republican Party has announced their Vice Presidential candidate for the November 4, 2008 General Election. The candidate will be:

Sarah Palin

Please make the necessary changes to your certified lists. The change has also been made on our website at:

http://www.sos.ca.gov/elections/elections_cand.htm

Enclosed are the Presidential lists identifying the update.

Attachments

2008 Presidential General - November 04, 2008

Official Certified List of Candidates

08/29/2008

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PRESIDENT

BARACK OBAMA

Democratic

JOE BIDEN

JOHN MCCAIN

Republican

SARAH PALIN

ALAN KEYES

American Independent

WILEY S. DRAKE, SR.

CYNTHIA MCKINNEY

Green

ROSA CLEMENTE

BOB BARR

Libertarian

WAYNE A. ROOT

RALPH NADER

Peace and Freedom

MATT GONZALEZ

* Incumbent

2008 Presidential General - November 04, 2008

Official Certified List of Candidates

08/29/2008

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PRESIDENT

BARACK OBAMA

JOE BIDEN

PO BOX 8102
CHICAGO, IL 60680
(866) 675-2008 (Business)
WEBSITE: my.barackobama.com

Democratic

JOHN MCCAIN

SARAH PALIN

PO BOX 16118
ARLINGTON, VA 22215
(703) 418-2008 (Business)
WEBSITE: johnmccain.com

Republican

ALAN KEYES

WILEY S. DRAKE, SR.

17195 SILVER PARKWAY, #337
FENTON, MI 48430
(312) 848-1605 (Business)
WEBSITE: www.alankeyes.com
E-MAIL: contact@alankeyes.com

American Independent

CYNTHIA MCKINNEY

ROSA CLEMENTE

P.O. BOX 311759
ATLANTA, GA 30031-1759
(510) 281-9190 (Business)
WEBSITE: www.runcynthiarun.org
E-MAIL: cynthia@runcynthiarun.org

Green

BOB BARR

WAYNE A. ROOT

PO BOX 725007
ATLANTA, GA 31139
WEBSITE: www.bobbarr2008.com
E-MAIL: info@bobbarr2008.com

Libertarian

2008 Presidential General - November 04, 2008

Official Certified List of Candidates

08/29/2008

Page 2 of 93

PRESIDENT

RALPH NADER

Peace and Freedom

MATT GONZALEZ

NADER FOR PRESIDENT 2008

3050 K ST NW

WASHINGTON, DC 20007

(202) 471-5833 (Business)

WEBSITE: www.votenader.org

* Incumbent

CERTIFICATE OF SERVICE BY U.S. MAIL

Case Name: **Markham Robinson v. Secretary of State**
Case No.: **3:08-CV-03836 WHA**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On September 4, 2008, I served the following documents:

- **Secretary of State Debra Bowen's Opposition to Plaintiff's Complaint for Declaratory and Injunctive Relief, and**
- **Declaration of Cathy Mitchell in Support of Secretary of State Debra Bowen's Opposition to Plaintiff's Complaint for Declaratory and Injunctive Relief**

by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550, addressed as follows:

Electronic Mail Notice List

I have caused the above-mentioned document(s) to be electronically served on the following person(s), who are currently on the list to receive e-mail notices for this case:

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Republican Party*

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*Attorney for Defendant, Senator John
McCain and the Republican National
Committee*

Manual Notice List

The following are those who are **not** on the list to receive e-mail notices for this case (who therefore require manual noticing):

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mmcgill@gibsondunn.com
*Attorney for Defendant, Senator John
McCain and the Republican National
Committee*

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on September 4, 2008, at Sacramento, California.

Michelle Martino

Declarant

/s/ Michelle Martino

Signature

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